No. 76-892

In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE M. FLOREA and
RAYMOND PAUL VARA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 541 F. 2d 568.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1976. A petition for rehearing was denied on October 29, 1976. On November 26, 1976, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including December 28, 1976, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether reversal of petitioners' convictions is required because a government agent operated the machine upon

which tape recordings previously admitted in evidence were replayed to the jury, pursuant to its request during deliberations.

STATEMENT

Following a second jury trial[1] in the United States District Court for the Northern District of Ohio, petitioners were convicted of three counts of interstate transmission of wagering information, in violation of 18 U.S.C. 1084. Each was sentenced to a year's imprisonment, to be followed by five years' probation, and a fine of $10,000. The court of appeals unanimously affirmed (Pet. App.).

The evidence included tapes of three telephone conversations, intercepted under a court order, in which petitioners compared information used to establish the point-spread or "line" on numerous basketball and football games. Each of the three conversations took place between Florea, in Ohio, and Vara in Las Vegas, Nevada. Each conversation was charged as a separate count.

In the first conversation, at about 11:20 a.m. on December 4, 1972, petitioners discussed, in addition to line information (Tr. 642), a wager from an individual who " 'can't come in to us direct' " (Tr. 641). They also discussed a loan to a third person at a rate of interest common in gambling circles (Tr. 642). The second call, made approximately an hour and a half later, "continue[d] the conversation about the loan account." In addition, Vara told Florea "Mississippi State is a good bet, it is not on the board." Florea also reviewed his line information with Vara (Tr. 644). In the third call, made three days later,

[1]Petitioners' first trial ended in a mistrial when the jury failed to reach a verdict.

petitioners compared lines with total scores and discussed making wagers on various teams using different lines (Tr. 645-646).

The government's expert on gambling, FBI Agent Ted Whitcomb, testified that the evidence showed petitioners were engaged in a "continuous, ongoing business relationship involved with predominantly sports wagering" (Tr. 646). He also testified that the line information exchanged in the telephone calls was "indispensable" for bookmaking operations (Tr. 646; see Tr. 578-581).

The jury began its deliberations on August 27, 1974. The next morning, it notified Deputy Clerk Jonathan Soucek that it wished to have the taped conversations replayed. Acting on instructions given him by the trial judge earlier that morning, Soucek brought the jury into the courtroom and allowed the jury to hear the tapes. The recorder was operated by FBI Agent Richard Ault, who had operated it during the trial (Tr. p. 4-6, 12-13).[2] Acting under the court's instructions, Ault said nothing to the jury. In fact, he sat with his back to the jury and spoke only to Deputy Clerk Soucek, and then only once, to inform Soucek that a certain tape would be played from the beginning (Tr. p. 11-14).

After a special hearing to consider petitioners' claims that this procedure had denied them a fair trial, the trial judge found (Tr. p. 17-18):

> The tapes were replayed pursuant to the instructions of the Court in a locked courtroom after everyone had been excluded therefrom except the technician and the Deputy Clerk. The jury was not returned to the locked courtroom from their deliberation room

[2]"Tr. p." refers to the transcript of the special hearing held on September 20, 1974.

until such time as Special Agent Ault had prepared at least the first tape for the replay and had assorted the remaining tapes in an orderly manner for replay.

Thereafter, the jury was ushered into the locked courtroom, and the Deputy Clerk, pursuant to the Court's instructions, advised and directed the conduct of all individuals that were present in the courtroom during replaying of the said tapes; namely, that there was to be no conversation with the exception of a request to play any entire specific tape or a portion thereof, that no notes were to be taken, and there was to be no conversations with any of the individuals present.

Thereafter, the tapes were replayed pursuant to the instructions of the Court as transmitted by the Deputy Clerk.

The district court also pointed out (Tr. p. 16-19):

The tapes, unlike the other exhibits, were of no value to the jury unless they were able to have those tapes replayed for them [if desired] * * * during the deliberations * * *.

Unfortunately, the only method available to accommodate the jury was to replay the tapes with the use of a rather complicated transcribing mechanism which required the technical knowledge of an operator or a technician.

* * * * *

[T]he tapes were [aready] * * *constructively in the possession of the jury * * *.

* * * * *

[Replaying the tapes] was merely an extension of the jury's deliberation within the privacy of the jury deliberation room impacted only by the necessity of the use of a technical piece of equipment which required the assistance of a technician for its operation. That technician was Special Agent Ault. He had been the technician throughout the entire trial, and he continued in that capacity during the extension of the jury's deliberation when [the jury] requested the replay of the tapes.

ARGUMENT

Petitioners contend that they were denied a fair trial when the court allowed Soucek to respond to the jury's request to hear the tapes, without notice to them and in their absence, and in allowing Agent Ault, who had been a government witness,[3] to play the tapes. These claims do not warrant plenary review by this Court.

1. It is of course true that a defendant has the right to be present at every stage of trial. Rule 43, Fed. R. Crim. P.; *Rogers* v. *United States*, 422 U.S. 35. However, as the court below correctly determined, defense counsel could and in effect did stipulate that the court "could permit the tapes to be replayed before the jury in counsel's absence" (Pet. App. 4a). As the court of appeals observed (*ibid.*):

> [I]n part of his instructions, the judge informed the jurors that all exhibits were available for their consideration and assistance during deliberations.

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[3]Petitioners' claim that Ault was one of the chief witnesses for the prosecution is incorrect. Ault was one of 16 government witnesses; his direct testimony covered 10 pages of an 800-page transcript and simply introduced the fact that petitioners' telephone conversations had been electronically intercepted and that their residences had been searched (Tr. 3-12).

> Thus, at that time, defense counsel knew that the tapes * * * would be available to the jury, and made no objection. Furthermore, when counsel for appellants finally did object, their primary objection was directed at the presence of Agent Ault, because of his "interest in the outcome of this lawsuit." Appellants have not demonstrated to us any prejudice that resulted from the judge's failure to answer the [jury's] request in open court. * * * [U]nder these circumstances, we determine that appellants constructively stipulated to the replay of the tapes at the jury's request.

Furthermore, the procedure followed here was similar to a procedure that had been followed in petitioners' first trial,[4] a fact that supports the court of appeals' conclusion that petitioners consented to the procedure.

2. In any event, exchanges between the court, its delegates, and the jury similar to the one in this case do not require reversal of the conviction where there is no showing of prejudice to the absent defendant. See *Rogers* v. *United States*, *supra*. No showing has been made here. The directions transmitted to the jury by Deputy Clerk Soucek stated merely that the jurors should not converse or take notes while the tapes were being played. There was nothing inimical to petitioners' defense in these directions or in the manner in which they were delivered. And while it might have been preferable for the court to select someone other than Ault to operate the tape recorder, Ault's role was strictly technical. He made no remarks to the jury, "was never

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[4]Tr. p. 6, 8, 9, 18; Tr. 359-361.

alone with [it] and was in its presence only long enough to replay the tapes" (Pet. App. 5a).

This is a far cry from *Turner* v. *Louisiana*, 379 U.S. 466. There, the two deputy sheriffs who were the principal witnesses for the prosecution were placed in charge of the jury during their sequestered deliberations and were "continuously in the company" of the jury during the three days of trial (379 U.S. at 468). The deputies "ate with them, conversed with them, and did errands for them" (*ibid.*). They had the "opportunity * * * to renew old friendships and make new acquaintances among the members of the jury" (*id.* at 473), and the defendant's fate "depended upon how much confidence the jury placed in these two witnesses" (*id.* at 474). This Court found this association to have violated the defendant's basic Fourteenth Amendment right to trial by jury. But in so holding it emphasized that the deputies' testimony "was not confined to some uncontroverted or merely formal aspect of the case for the prosecution" and that the deputies' contact with the jury was not a "brief encounter, but * * * a continuous and intimate association throughout" the deliberations (*id.* at 473).

As the courts below correctly concluded, quite the contrary is the case here. Ault's testimony on direct examination simply established that he was the case agent and had obtained court orders to monitor two telephones, had recorded a number of conversations, had directed the execution of search warrants on petitioners' homes, and had directed that handwriting exemplars be obtained from petitioners (Tr. 3-12). And, unlike the situation in *Turner*, Ault's subsequent contact with the jury was brief, perfunctory and impersonal.

In light of these facts—as the court below found—"Ault's presence did not affect [petitioners'] 'substantial rights' " (Pet. App. 5a).[5]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1977.

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[5]Petitioners correctly note that in *United States* v. *Pittman*, 449 F. 2d 1284, the Ninth Circuit reversed a conviction obtained in circumstances somewhat similar to those presented here. There, however, the agent who replayed the tapes for the jury "had been prominently aligned with the Government's case during the trial [and] had testified at length." 449 F. 2d at 1285. That was not the case here. See note 3, *supra*; Pet. App. 6a. Moreover, there is no suggestion in *Pittman* that defense counsel acquiesced in the procedure adopted for replaying the tapes. At all events, there is no need for this Court to resolve the difference, if any, between the approach taken in *Pittman* and the result here. The issue is not one that arises with any frequency, and it is unlikely to recur in the Sixth Circuit, since the court below emphasized that, in the absence of a prior stipulation concerning contact with the jury, "in the future we will not * * * condone similar [occurrences]" (Pet. App. 6a).

DOJ-1977-03